No. 11,352

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,
Appellee.

BRIEF FOR APPELLANT

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No. 11352

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,
a corporation,
Appellant,

vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this action under 28 U.S.C.A., Sec. 41(8), which gives the District Courts of the United States jurisdiction "Of all suits and proceedings arising under any law regulating commerce," since this action arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act (49 U.S.C.A., Sec. 6(7)). As appears from the complaint (Tr.

2-10), this action was brought by a carrier by railroad, subject to the Interstate Commerce Act, to recover the difference between the amount paid by Defense Supplies Corporation (hereinafter referred to as Defense Supplies) for transportation services from Seattle, Washington, and Los Angeles, California, and the amount of charges for such services based upon the applicable rates therefor contained in the duly filed and published tariffs.

The District Court also had jurisdiction of this action under 28 U.S.C.A., Sec. 41(1) in that it arises under a law of the United States and more especially under Section 321 of Title III, Part II, of the Transportation Act of 1940 (49 U.S.C.A., Sec. 65, set out in full in Appendix A hereto), and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000. As appears from the complaint (Tr. 6-10), it involves the question whether motor benzol owned by Defense Supplies, a corporate instrumentality of the United States, was, at the time of transportation, military or naval property of the United States moving for military or naval and not for civil use within the meaning of Section 321(a).

The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court (Tr. 215) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S.C.A., Sec. 345.

STATEMENT OF THE CASE

The facts were stipulated and the Stipulation provides that both parties may bring to the attention of the Court

any facts of which the Court may take judicial notice.

This action was brought by Southern Pacific Company (hereinafter referred to as Appellant) against Defense Supplies to recover the sum of $23,049.51, being the difference between transportation charges in the aggregate amount of $56,736.14, based on the duly published and filed rates, and the aggregate amount of $33,686.63 paid by Defense Supplies for the transportation of a number of tank car shipments of motor benzol during the years 1942 and 1943, beginning in July, 1942, and ending in December, 1943, from Seattle, Washington to Los Angeles and Vernon, California (Vernon being within the Los Angeles switching limits) (Tr. 3-6).

Defense Supplies was, during all of the times relative to this case prior to July 1, 1945, a corporation duly created by Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of the President, pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended (Tr. 32). A copy of the Charter as amended on February 15, 1941, and July 9, 1941, is a part of the Stipulation of Facts herein as Exhibit A (Tr. 53-57).

As of July 1, 1945, Defense Supplies was dissolved and Reconstruction Finance Corporation made subject to all liabilities of Defense Supplies, whether arising out of contract or otherwise (Public Law 109, approved June 30, 1945). On November 5, 1945, the District Court entered an order continuing this action against Reconstruction Finance Corporation and substituting the latter Corporation as defendant in the place and stead of Defense Supplies, as provided in Public Law 109 (Tr. 197).

From its Charter (Tr. 53-57) it appears that the total authorized capital stock of Defense Supplies was $5,000,000, of which $1,000,000 was to be paid in immediately and the balance as called. The stock was of one class, having a par value of $100 per share, and to be issued for cash only. Reconstruction Finance Corporation was the owner of all the capital stock (United States owns all of the capital stock of Reconstruction Finance Corporation) and the "stockholder shall not be liable for the debts, contracts or engagements of the Corporation except to the extent of unpaid stock subscriptions." The "affairs and business of the Corporation shall be managed by a Board of Directors who shall be appointed by Reconstruction Finance Corporation" pursuant to the provisions of the Charter and By-Laws of the Corporation. One of the objects, purposes and powers of the Corporation was "To produce, acquire, carry, sell, or otherwise dispose of strategic and critical materials as defined by the President." It is stated in the Charter that "the Corporation shall be an instrumentality of the United States Government."

At all times material to this action the accounts of Defense Supplies were not audited, settled or adjusted by the General Accounting Office of the United States (Tr. 33).

A copy of the By-Laws of Defense Supplies is a part of the Stipulation of Facts herein as Exhibit B (Tr. 57-62). From the By-Laws it appears that the Corporation had a Board of Directors appointed by its stockholder, Reconstruction Finance Corporation, and an Executive Committee which possessed and exercised all of the power and authority of the Board of Directors at such time as

the Board of Directors was not in session. The Corporation had other officers such as a commercial business corporation usually has, that is, a Chairman of the Board of Directors, a President, one or more Vice Presidents, a Secretary, a Treasurer, a General Counsel, and such other officers and agents as the Board of Directors deemed advisable. The Treasurer of the Corporation had the custody of the corporate funds and securities and disbursed "the funds of the Corporation pursuant to the authority of the Board of Directors of the Corporation or Executive Committee."

On April 2, 1942, the War Production Board, by its letter of that date, recommended to Defense Supplies that it purchase 50,000,000 gallons of motor benzol for the purpose of storing such benzol and creating a stock pile thereof (Tr. 35-39). On April 7, 1942, the Executive Committee of Defense Supplies adopted a resolution which contained the following (Tr. 33):

> "Resolved First, That this corporation purchase and place in storage not to exceed 50,000,000 gallons of motor benzol at a price not in excess of 10¢ per gallon.
>
> "Resolved Second, That the President or any Vice President be and hereby is authorized:
>
> 1. To enter into such agreements, approved by the General Counsel or counsel designated by him, as may be necessary to carry out the provisions of this resolution and the purchase referred to;
> 2. To make (or designate a person or persons to make) such other arrangements as may be deemed necessary or appropriate, including but not limited to transportation, insurance, storage, handling, production and disposition of such motor benzol."

The resolution contained a "Resolved Third" which authorized the Treasurer or an Assistant Treasurer, among other things "to disburse such funds of the Corporation as are required to be expended pursuant to any such agreements and arrangements" (Tr. 33).

Said resolution was amended by a resolution adopted by the Executive Committee of Defense Supplies on July 18, 1942, by striking from paragraph 2 in Resolved Second thereof the words "and disposition of such motor benzol" and substituting therefor the following "processing and disposition of such motor benzol and by-products resulting therefrom" (Tr. 34).

On September 21, 1942, the Executive Committee of Defense Supplies further amended the resolution adopted on April 7, 1942, by striking the Resolved First clause and inserting in lieu thereof the following (Tr. 34-35):

> "Resolved First, That this corporation purchase, store, and arrange for further processing and sale of not to exceed 50,000,000 gallons of motor benzol at a price not in excess of 16¢ per gallon."

Further resolutions were adopted by the Executive Committee of Defense Supplies from time to time further amending said resolution adopted on April 7, 1942, by increasing the quantity of benzol to be purchased and stored by the Corporation, and for which Defense Supplies was to arrange for further processing and sale, and by increasing the price which the Corporation was authorized to pay for benzol purchased (Tr. 35).

During the years 1942 and 1943, beginning in the month of July, 1942, Appellant, in participation with other interstate common carriers by railroad, at the request of

Defense Supplies, transported for and on behalf of that Corporation from Seattle, Washington to Los Angeles and Vernon, California (Vernon being within the tariff switching limits of Los Angeles), upon Government bills of lading prepared and furnished by the agent of Defense Supplies, a number of tank car shipments of motor benzol (Tr. 41). On each of said bills of lading Defense Supplies (Seattle Gas Company) was shown as shipper and consignor and Defense Supplies c/o Wilshire Oil Company, Inc., was shown as consignee (Tr. 41). The shipments involved in this suit consisted of 944,032 gallons, more or less, of motor benzol purchased and acquired by Defense Supplies from Seattle Gas Company, Seattle, Washington, during the period from June, 1942, to November, 1943, and at the time of said transportation said motor benzol was owned by and was the property of Defense Supplies (Tr. 42). Each purchase of motor benzol by Defense Supplies was made pursuant to allocations by the War Production Board and to notice of such allocations substantially in the form of a letter and attachment thereto (Tr. 42) made a part of the Stipulation of Facts herein as Exhibit C (Tr. 63-65).

The first purchase was made by telegram from Defense Supplies to Seattle Gas Company, dated June 27, 1942, a copy of which is made a part of the Stipulation of Facts as Exhibit D (Tr. 42, 66). The subsequent purchases were evidenced by letters from Defense Supplies to Seattle Gas Company with said company's acceptance endorsed thereon. A copy of one of these letters is made a part of the Stipulation of Facts as Exhibit E (Tr. 42, 67-68), and all of the other letters covering subsequent purchases were

in all respects similar to said Exhibit E except as to dates, quantity of benzol and price (Tr. 42-43). The various shipments of said benzol, upon arrival at destination, were stored for Defense Supplies at the Vernon tank farm of said Wilshire Oil Company, Inc., pursuant to a contract dated May 13, 1942, between Defense Supplies and Wilshire Oil Company, Inc., a copy of which said contract is made a part of the Stipulation of Facts as Exhibit F (Tr. 43, 68-73). In said contract of May 13, 1942, it is recited (Tr. 68-69):

> "WHEREAS, Supplies [Defense Supplies Corporation] is engaged in purchasing motor benzol from manufacturers thereof who are unable to dispose of said benzol for uses permissible under Order M-137 of the War Production Board issued April 20, 1942, and is desirous of storing such benzol until such time as it may be allocated to various consumers thereof by the War Production Board."

Order M-137, referred to in the preceding quotation is Conservation Order No. M-137 issued by the Director of Industry Operations of the War Production Board on April 20, 1942 (7 F.R. 2944; Tr. 41). This order related to the chemical compound known by the name benzene or by the name benzol, and took effect immediately upon issuance. This order imposed restrictions upon the use and upon the delivery of benzene. The order begins as follows:

> "The fulfillments of requirements for the defense of the United States has created a shortage in the supply of benzene for defense, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and to promote the national defense."

Conservation Order M-137 was amended on June 1, 1942 (7 F.R. 4172; Tr. 41). As amended the order imposed restrictions upon the use and delivery of benzene (benzol) and provided for the filing of applications for delivery of benzene (benzol) and the filing of reports by producers and distributors.

On July 23, 1943, the title to Conservation Order M-137 was amended to read "Allocation Order M-137" (8 F.R. 10350; Tr. 41). This order as amended also imposed restrictions on delivery and acceptance of delivery of benzene (benzol) and instructions on its use.

The first shipment of said motor benzol involved in this case arrived in said storage July 28, 1942, and the last on December 9, 1943 (Tr. 43).

Said shipments were billed and forwarded with charges collect and Appellant duly presented to Defense Supplies its respective bills aggregating the sum of $56,736.14 for the transportation charges for said shipments, based on the duly published and filed rates for such transportation services (Tr. 44). Defense Supplies, however, claiming the right to make land-grant deductions (hereinafter explained) in amounts aggregating the sum of $23,049.51, refused to make payments in the amount of $56,736.14 for such transportation services but paid to Appellant amounts aggregating the sum of $33,686.63, which was the aggregate amount of transportation charges payable to Appellant by Defense Supplies for said transportation services if said Corporatoin was entitled to land-grant deductions on the entire quantity of 944,032 gallons of benzol transported (Tr. 44). The amounts so paid were accepted by Appellant under protest as part payments only and

Appellant subsequently, and prior to the bringing of this action rendered its bills to Defense Supplies for the unpaid balances for said transportation charges for the sum of $23,049.51 (Tr. 44).

Motor benzol is not suitable for use in the manufacture of cumene, ethyl benzene or styrene, processing and treatment of motor benzol being required to produce industrial pure benzol suitable for such use (Tr. 46). On October 16, 1943, Defense Supplies entered into a contract with Shell Oil Company, Inc., a copy of which contract is made a part of the Stipulation of Facts as Exhibit G (Tr. 46, 74-84), for the treatment and processing of motor benzol, described therein as untreated benzol, and thus produce industrial pure benzol at the Wilmington refinery of Shell Oil Company near Watson, California (Tr. 46). Under the same terms and conditions as contained in said contract, said 944,032 gallons more or less of motor benzol purchased and acquired by Defense Supplies from said Seattle Gas Company and stored for the Corporation at the Vernon tank farm of Wilshire Oil Company were treated and processed by said Shell Oil Company, Inc. (Tr. 47).

Defense Supplies made and entered into a contract with Wilshire Oil Company dated November 16, 1943, and a contract with Richfield Oil Corporation dated December 3, 1943, for the sale by it to said oil companies of industrial pure benzol to be used by said purchasers in the manufacture of cumene, for use by or as directed by the United States Government (Tr. 47). Under the terms of each contract the purchaser agreed to pay 17¢ per gallon f.o.b. tank cars or tank trucks at seller's storage, payment to be made in cash promptly upon receipt of seller's

invoices supported by evidence of the quantity shipped (Tr. 85, 87-88). A copy of each of these contracts is a part of the Stipulation of Facts as Exhibits H (Tr. 84-86) and I (Tr. 87-89), respectively.

Defense Supplies made and entered into a contract with Rubber Reserve Company, dated November 30, 1943, for the sale by it of industrial pure benzol to be used by said Company in the manufacture of styrene, for use by or as directed by the United States Government (Tr. 47). The price of the industrial pure benzol sold under said contract was 17¢ a gallon f.o.b. tank cars or tank trucks at seller's storage, payment to be made in cash promptly upon receipt of seller's invoice supported by evidence of the quantity shipped (Tr. 90). A copy of said contract is a part of the Stipulation of Facts as Exhibit J (Tr. 89-92).

Rubber Reserve Company was, during all of the times relative to this action prior to July 1, 1945, a corporation duly created by Reconstruction Finance Corporation at the request of the Federal Loan Administrator with the approval of the President, pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act as amended (Tr. 47). It had a capital stock of $5,000,000 consisting of 50,000 shares of the par value of $100 each. This stock was of one class only, was non-assessable, and issued only for cash fully paid (Tr. 94). Reconstruction Finance Corporation was the owner of all the capital stock of Rubber Reserve Company (Tr. 94), and the United States in turn is the owner of the capital stock of Reconstruction Finance Corporation. A copy of the Charter of Rubber Reserve Company is a part of the Stipulation of Facts as Exhibit K (Tr. 92-

95). Under this Charter the stockholders are not liable for the debts, contracts, or engagements of the Corporation except to the extent of unpaid stock subscriptions, and the Charter provided that the Corporation shall be managed by its Board of Directors, officers or agents pursuant to the Charter and provisions of the By-Laws of the Corporation as prescribed by Reconstruction Finance Corporation (Tr. 95).

At all times material to this action the accounts of Rubber Reserve Company were not audited, settled, or adjusted by the General Accounting Office of the United States (Tr. 48).

Commencing in November, 1943, and continuing through August, 1944, Defense Supplies sold and delivered to said Wilshire Oil Company, Richfield Oil Corporation, and Rubber Reserve Company, industrial pure benzol processed and produced as aforesaid from said 944,032 gallons of motor benzol. Said sales were made pursuant to allocations by the War Production Board and to recommendations by the Petroleum Administration for War as to the benzol to be used in the manufacture of cumene and by the Office of Rubber Director as to the benzol to be used in the manufacture of styrene. Of the industrial pure benzol produced from said 944,032 gallons of motor benzol, 40.56% was sold to and delivered to Wilshire Oil Company and Richfield Oil Corporation under said contracts dated November 16, 1943 (Exhibit H, Tr. 84-86), and December 3, 1943 (Exhibit I, Tr. 87-89), for use in the manufacture of cumene (Tr. 48). Wilshire Oil Company and Richfield Oil Corporation manufactured cumene from the industrial pure benzol sold to them by combining said benzol with propylene to produce by chemical reaction cumene (Tr. 49).

The balance of said industrial pure benzol (59.44%) was sold and delivered by Defense Supplies to Rubber Reserve Company under said contract dated November 30, 1943 (Exhibit J, Tr. 89-92), for use in the manufacture of styrene (Tr. 49). Styrene is produced from ethyl benzene by chemical reaction in the presence of a catalyst. Ethyl benzene is produced by combining benzol with ethylene by chemical reaction. Rubber Reserve Company first produced ethyl benzene from the industrial pure benzol sold to said company by Defense Supplies. With that portion or quantity of ethyl benzene produced from 23.06% of the industrial pure benzol processed and produced as aforesaid from said 944,032 gallons of motor benzol, Rubber Reserve Company produced styrene. Pursuant to allocations by the Office of Rubber Director, the styrene so produced was sold by Rubber Reserve Company to rubber companies for use in the production of synthetic rubber. Said synthetic rubber was produced by combining, through chemical reaction, styrene and butadiene in the presence of a catalyst. Said rubber companies either used the synthetic rubber so produced to manufacture rubber products or sold it to other companies for the manufacture of rubber products. 42% of the rubber products manufactured as aforesaid was sold to the Army and Navy for their uses, and 58% of said rubber products was sold for civilian uses pursuant to allocations made by the War Production Board. 9.66% of the motor benzol involved in this action was used in the production of rubber products sold to the Army and Navy for their use, and 13.4% of the motor benzol involved in this action was used in the production of rubber products sold for such civilian use (Tr. 49-50).

The remainder of the ethyl benzene produced by Rubber Reserve Company, that is, that portion or quantity made from 36.38% of industrial pure benzol processed and produced as aforesaid from 944,032 gallons of motor benzol, was sold by Rubber Reserve Company at the request of the Petroleum Administration for War to refineries engaged in producing 100 octane aviation gasoline to be used by them in the manufacture of such gasoline for sale to Defense Supplies (Tr. 50). Said sales were evidenced by letter agreements in the form of Exhibit O, which is a part of the Stipulation of Facts (Tr. 51, 155-160).

Cumene and ethyl benzene are components of 100 octane aviation gasoline, by blending operations which comprise a physical mixture without chemical change. During the times herein mentioned subsequent to December, 1942, the manufacture, use and disposition of cumene and ethyl benzene were under the control and administration of the Petroleum Administration for War. Pursuant to allocations by said Administration the cumene manufactured by Wilshire Oil Company and Richfield Oil Corporation from the benzol sold to them by Defense Supplies as aforesaid, was used by said companies in the manufacture of 100 octane aviation gasoline produced by said companies and subsequently sold to Defense Supplies in accordance with the contracts (Exhibits M and N) hereinafter referred to (Tr. 51).

Pursuant to request of the Petroleum Administration for War, of the War Department, and of the Navy Department, Defense Supplies entered into a contract to purchase the production of 100 octane aviation gasoline manufactured by the various refineries, including Wilshire Oil

Company and Richfield Oil Corporation. The contracts entered into by Defense Supplies with Wilshire Oil Company and Richfield Oil Corporation, as in force and effect at all times herein mentioned, were dated December 20, 1943, and February 20, 1943, respectively (Tr. 49). Copies of said contracts, except the exhibits thereto, are a part of the Stipulation of Facts as Exhibit M (Tr. 102-127) and Exhibit N (Tr. 128-154), respectively.

The 100 octane aviation gasoline produced by Wilshire Oil Company and Richfield Oil Corporation by blending with cumene manufactured by said companies from benzol purchased by them from Defense Supplies as aforesaid, was purchased by Defense Supplies from said companies pursuant to said contracts dated December 20, 1943 and February 20, 1943 (Exhibits M and N). The 100 octane aviation gasoline produced by other refineries by blending with ethyl benzene manufactured by Rubber Reserve Company from the benzol purchased by said Company from Defense Supplies, was likewise purchased by Defense Supplies from said refineries pursuant to contracts similar to said Exhibits M and N (Tr. 51-52).

The 100 octane aviation gasoline so purchased by Defense Supplies was sold by that corporation to the Army and Navy pursuant to a contract executed as of May 20, 1943 by the War Department, the Navy Department, the Petroleum Administration for War, and Defense Supplies (Tr. 52). A copy of this contract, except the exhibits thereto, is a part of the Stipulation of Facts as Exhibit P (Tr. 52, 160-170). A copy of the contract of December 19, 1942 (referred to in said contract of May 20, 1943, Exhibit P), except exhibits thereto, is a part of the Stipulation of Facts as Exhibit Q (Tr. 52, 170-180).

The contract of May 20, 1943 (Exhibit P), was modified and extended by the contract of July 1, 1944, a copy of which contract, except certain provisions thereof not deemed material, is a part of the Stipulation of Facts as Exhibit R (Tr. 52, 180-188).

Under the terms of the contract of May 20, 1943, the amount of gasoline purchased by the Army and Navy from Defense Supplies was subject as to quantity and end user to determination and allocations of the Allied Petroleum Production Aviation Committee comprising representatives of the Army and Navy, Petroleum Administration for War, and the British Government, and as to refinery source to release by Petroleum Administration for War (Exhibit P, Tr. 161, 163). Deliveries of gasoline and passage of title from Defense Supplies to the Army or Navy at the refinery were considered as having been made when the gasoline passed through the intake pipe of the vessel, when a loaded tank car was turned over to a railroad, or when the loading of a truck was completed, as the case may be (Exhibit P, Tr. 164).

Both the Army and the Navy paid Defense Supplies for the gasoline purchased by them (Exhibit P, Tr. 162), and under the provisions of the contract of December 19, 1942 (Exhibit Q, Tr. 171), the War Department advanced to Defense Supplies $34,000,000, and the Navy Department advanced to Defense Supplies $66,000,000 to be applied as payment for gasoline to be acquired by each Department respectively from Defense Supplies.

Defense Supplies in its answer (Tr. 25-31) denied liability for the sum of $23,049.51, claiming that it was entitled to make land-grant deductions in that amount from the aggregate amount of the transportation charges

on the ground that the motor benzol was, at the time of transportation, "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321(a), Title III, Part II, of the Transportation Act of 1940 (Act of September 18, 1940, c. 722, Sec. 321, 54 Stat. 954; 49 U.S.C.A. Sec. 65 in 1945 Annual Cumulative Pocket Part), which provides that:

> "Notwithstanding any other provisions of law but subject to the provisions of Sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty * * *."

By granting public lands to various companies in the aid of the construction of their lines of railroad, the United States secured concessions from the established tariffs from the carriers so aided, that is, the United States secured the right, when Government property was transported, to make deductions from the duly filed and published tariff rates applicable generally to the kind of property transported for the Government. The amount to be deducted depended upon the land-grant aided mileage of the line of railroad over which said transportation services were performed.

Other railroads not aided by such grants, in order to participate in the transportation of Government property, entered into agreements with the United States, called equalization agreements, by which they agreed to carry freight routed over their lines at the lowest net rates available as derived through deductions on account of land-grant mileage or distance. The carriers by railroad participating in the transportation services involved in this case were either land-grant aided roads or had entered into such equalization agreements.

At the time of the passage of the Transportation Act of 1940 (approved on September 18, 1940), the United States was entitled to land-grant deductions from duly published filed rates on the transportation of all government-owned property over land-grant aided lines and over the lines of equalizing carriers. Land-grant aided carriers by railroad, however, became entitled to the benefits of Section 321(a) by release of certain claims against the United States to lands, interests therein, etc., as required by Section 321(b) of Title III, Part II, of the Transportation Act of 1940. Subsequent to the passage of the Transportation Act of 1940 and prior to the shipments involved in this case, each of the land-grant aided carriers by railroad participating in the transportation services performed, and each of the land-grant aided carriers by railroad with which any participating carrier had agreed to equalize, filed the release required by Section 321(b) of the Transportation Act of 1940 (Tr. 45) and thereby each carrier participating in the transportation services performed became entitled to charge the full applicable commercial rates, fares and charges for the transportation of property of the United States, or on its behalf,

except for the transportation of "military or naval property of the United States moving for military or naval and not for civil use." In other words, after the passage of the Transportation Act of 1940 and the filing of such releases, the right of the United States to make land-grant deductions from the full applicable tariff rates was limited to the transportation of "military or naval property of the United States moving for military or naval and not for civil use."

If, therefore, the motor benzol involved in this case was, at the time of its transportation, military or naval property of the United States moving for military or naval and not for civil use, Defense Supplies was entitled to make land-grant deductions from the full applicable published tariff rates on all of the transportation services involved in this case and Appellant is not entitled to recover. If, on the other hand, the motor benzol involved in this case was not, at the time of its transportation, military or naval property of the United States moving for military or naval and not for civil use, Defense Supplies was not entitled to such land-grant deductions on any of the shipments involved in this case, and Appellant is entitled to recover the sum of $23,049.51.

The District Court found as facts: (1) that the motor benzol was, at the time of its transportation, owned by Defense Supplies (Finding No. VI, Tr. 213); (2) that the motor benzol was, at the time of its transportation, military or naval property of the United States (Finding No. VII, Tr. 213); and (3) that the motor benzol, at the time of transportation, was moving for use in the production of aviation gasoline and synthetic rubber for use in the direct prosecution of the war and was, at the time

of its transportation, moving for military or naval and not for civil use (Finding No. VIII, Tr. 213).

The Court concluded: (1) that the motor benzol, naked legal title to which, at the time of its transportation, stood in the name of Defense Supplies, a corporate instrumentality of the United States, was, at the time of its transportation, "property of the United States" within the meaning of that language as used in Section 321(a) of the Transportation Act of 1940 (Conclusion of Law No. I, Tr. 213); (2) that the motor benzol, at the time of its transportation, was "military or naval" property of the United States and was "moving for military or naval and not for civil use" within the meaning of that language as it is used in Section 321(a) in the Transportation Act of 1940 (Conclusion of Law No. II, Tr. 213); (3) that Defense Supplies was entitled to make land-grant deductions from the applicable published tariff rates under the provisions of Section 321(a) of the Transportation Act of 1940 for the transportation services in the transportation of the motor benzol (Conclusion of Law No. III, Tr. 214); and (4) that Appellant is entitled to recover nothing from Defense Supplies, and Defense Supplies is entitled to its costs of suit (Conclusion of Law No. IV, Tr. 214).

On February 28, 1946, judgment was entered for Defense Supplies (Tr. 215), and this is an appeal from that judgment.

SPECIFICATION OF ERRORS

The errors in the District Court upon which Appellant relies are as follows:

I.

The District Court erred in making its Finding of Fact No. VII in that:

1. Said finding is not supported by the evidence.

2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) The motor benzol was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies, a corporate entity separate and distinct from the United States, and was not the property of the United States.

(b) The motor benzol was not, at the time of its transportation, military or naval property but only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline which, when manufactured or produced, was suitable for military or naval use and of synthetic rubber which, when manufactured or produced, was suitable for use in the manufacture or production of rubber products suitable for military or naval use.

(c) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that:

(a) Said finding is based on the view that the motor benzol which was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies, a corporate entity separate and distinct from the United States, was the property of the United States.

(b) Said finding is based on the view that the motor benzol unsuitable at the time of its transportation for military or naval use, was, at the time of its transportation, military or naval property when materials manufactured or produced therefrom by purchasers of the motor benzol from Defense Supplies, subsequent to its transportation, were used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, which property was acquired by the United States for military or naval use.

II.

The District Court erred in making its Finding of Fact No. VIII in that:

1. Said finding is not supported by the evidence.

2. Said finding is contrary to the evidence in that the evidence (Stipulation of Facts) shows that:

(a) At the time of its transportation the motor benzol was moving for storage, processing and sale and was, subsequent to its transportation, stored and processed.

(b) Subsequent to its transportation the motor benzol was sold by Defense Supplies for use, in con-

nection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and of synthetic rubber, which was suitable for use in the manufacture or production of rubber products.

(c) Said motor benzol was used, in connection with other materials, in the manufacture or production of materials which were suitable for use and used, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline suitable for military or naval use, and of synthetic rubber which was suitable for use and used in the manufacture or production of rubber products suitable for military or naval use.

(d) The United States bought a portion of the rubber products and the 100 octane aviation gasoline, of which the motor benzol ultimately became a constituent part, for use by the Army and Navy.

3. Said finding was induced by an erroneous view of the law in that said finding is based on the view that the use of the motor benzol, in connection with other materials, in the manufacture or production of materials suitable for use and used, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, was a military or naval use of the motor benzol.

III.

The District Court's Conclusion of Law No. I is erroneous in that it is based on the erroneous Finding of Fact No. VII, and on the erroneous assumption, which is

not supported by any evidence, that Defense Supplies had, at the time of transportation, only a naked legal title to the motor benzol, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraph I.

IV.

The District Court's Conclusion of Law No. II is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

V.

The District Court's Conclusion of Law No. III is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I and II, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VI.

The District Court's Conclusion of Law No. IV is erroneous in that it is based on the erroneous Findings of Fact Nos. VII and VIII, and on the erroneous Conclusions of Law Nos. I, II and III, and in that it is contrary to the law and to the evidence, as set forth hereinbefore in Paragraphs I and II.

VII.

The District Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "property of the United States" within the meaning of that language as it is used in Section 321(a) of the Trans-

portation Act of 1940, but was the property of and owned by Defense Supplies, a corporate entity separate and distinct from the United States.

VIII.

The District Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "military or naval" property of the United States within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and synthetic rubber suitable for use in the manufacture or production of rubber products.

IX.

The District Court erred in failing to conclude that the motor benzol was not, at the time of its transportation, "moving for military or naval and not for civil use" within the meaning of that language as it is used in Section 321(a) of the Transportation Act of 1940, but was moving for storage, processing and sale, which are not military or naval uses within the meaning of the language in Section 321(a).

X.

The District Court erred in failing to conclude that Defense Supplies was not entitled to make land-grant deductions from the applicable published tariff rates with respect to any of the transportation services provided by

Appellant and other participating carriers in the transportation of the motor benzol involved in this case.

XI.

The District Court erred in failing to conclude that Appellant is entitled to recover from Appellee the sum of $23,049.51 and its costs herein incurred.

ARGUMENT

THE MOTOR BENZOL WAS NOT PROPERTY OF THE UNITED STATES, BUT OF DEFENSE SUPPLIES, A CORPORATE ENTITY SEPARATE AND DISTINCT FROM THE UNITED STATES.

There is no evidence whatever in the case, and no evidence from which any reasonable inference can be drawn, that the motor benzol was, at the time of its transportation, property of the United States. In its answer, defendant, Defense Supplies, alleged "that said benzol was motor benzol which was purchased and acquired by defendant from Seattle Gas Company f.o.b. tank cars Seattle, Washington, prior to the transportation thereof as alleged in the complaint, and was owned by and the property of defendant at all times therein mentioned" (Tr. 27). This allegation is supported by the Stipulation of Facts as follows (Tr. 42):

> "The shipments involved in this suit consisted of 944,032 gallons, more or less, of motor benzol purchased and acquired by defendant from Seattle Gas Company, Seattle, Washington, from time to time during the period from June, 1942 to November, 1943, and at the times of said transportation said motor benzol was owned by and was the property of defendant."

Defense Supplies was a corporation created by Reconstruction Finance Corporation and it had charter power "to produce, acquire, carry, sell, or otherwise deal in strategic and critical materials as defined by the President" (Tr. 53).

In authorizing the purchase of the motor benzol Defense Supplies was evidently proceeding under this power. In its resolution authorizing the purchase of the motor benzol, the Executive Committee authorized the Treasurer or an Assistant Treasurer "to disburse such funds of the Corporation as are required to be expended" in purchasing, storing, and otherwise handling the motor benzol (Tr. 33-34). There is no evidence whatever in the case, and no evidence from which any reasonable inference can be drawn, that Defense Supplies purchased the motor benzol with funds appropriated by Congress for that purpose.

This is, therefore, not a case in which Defense Supplies merely held naked legal title to the motor benzol because of having purchased it with funds furnished by the United States. In such circumstances cases like *King County, Washington, et al. v. U. S. Shipping Board Emergency Fleet Corp.* (C.C.A. 9), 282 Fed. 950, are no authority for the position that the motor benzol was property of the United States. In the case referred to it was held that certain property to which the Emergency Fleet Corporation had title was not taxable because it was the property of the United States. The basis of that decision by this Court was that the Emergency Fleet Corporation merely held legal title to the property in question, that corporation acting as a naked trustee with the entire beneficial interest in the United States. This clearly appeared from the opinion (p. 953):

"Furthermore, it appears that this property was purchased, *not with money paid in for the capital stock of the Fleet Corporation, but with funds especially appropriated by Congress for the purpose, some time after the Fleet Corporation was fully organized.* Power to acquire shipyards is not to be found in the act providing for the creation of the Fleet Corporation. The acquisition of such property was for the first time authorized by the Act of November 4, 1918 (40 Stat., 1022 (Comp. St. Ann. Supp. 1919, Sec. 3115 1/16ddd)), and an appropriation of $34,662,500 was made for that purpose. Clearly, in the matter of expending this public money, under the direction of Congress and the President, in the purchase of property for governmental purposes, *and in taking and holding the legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the government.* And what does it matter that the Fleet Corporation may, in a measure, have had the status of an ordinary corporation? Let us assume that it was purely a private concern, and originally had none of the attributes of a public agency, and then let us suppose that by Congress and the President, with its consent, public funds were placed in its custody, to be expended by it in the acquisition of shipyards for government uses, and it was authorized to take and hold the legal title thereto; would it be contended that such property continued to be subject to state taxation merely because the legal title was held by a private corporation having no real interest? The taxable character of property is to be referred to the status of the real, rather than of the nominal, owner. *Private property is not exempt from taxation because the government holds the legal title thereto, and by parity of reasoning neither is public property taxable because the naked legal title*

is in a private person. Carroll v. Safford, 3 How. 444, 11 L. Ed. 671; Witherspoon v. Duncan, 4 Wall 210, 18 L. Ed. 339." (Emphasis supplied.)*

A like situation was presented in *U. S. Shipping Board Emergency Fleet Corp. v. Delaware County, Pa.* (C.C.A. 3), 17 F. (2d) 40, certiorari denied 278 U.S. 607, 73 L. Ed. 533, and the Court held that property, legal title to which was in Emergency Fleet Corporation, was not subject to taxation. The Court said (p. 40):

> *"It thus appears that not only was the legal title held by a corporate agency of the United States, but that the purchase price of the land in question was paid to the purchaser by the United States.* In the light of such facts, and there being no suggestion of ownership or interest elsewhere, *it is clear that the real ownership of the land was and is in the United States, and that the Fleet Corporation, the holder of the title, held such title as a mere legal holder for the benefit of the United States."*

Thus, in this case we do not have a situation in which Defense Supplies merely held legal title to property with the beneficial interest in the United States. The evidence in this case shows without dispute that the benzol was purchased by and was, at the time of its transportation, the property of and owned by Defense Supplies.

Property of Defense Supplies was not property of the United States merely because the United States owned all of the capital stock of Reconstruction Finance Corporation, which in turn owned all of the capital stock of Defense Supplies. Defense Supplies was an entity separate

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*Hereafter in this brief emphasis is supplied.

and distinct from the United States and from its departments or boards.

In *United States v. Strang,* 254 U.S. 491, 65 L. Ed. 368, the question involved was whether a person employed as an inspector by the Emergency Fleet Corporation was an agent of the United States within the meaning of Section 41 of the Criminal Code, which provides:

> "Sec. 41. No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years."

Strang was indicted on four counts, three of which charged that he unlawfully acted as agent of the United States in transacting business with the Duval Ship Outfitting Company, a co-partnership of which he was a member, in that while an employee of the Fleet Corporation as an inspector he signed and executed (February, 1919) three separate orders to the Outfitting Company for repairs and alterations on the steamship Lone Star. Counsel for the Government contended that the Fleet Corporation was an agency or instrumentality of the United States formed only as an arm for executing purely governmental powers and duties vested in the President and by him delegated to the corporation. Counsel for the Government

further contended that the acts of the Corporation within its delegated authority were the acts of the United States, and that therefore in placing orders with the Duval Company in behalf of the Fleet Corporation while performing the duties as inspector, Strang necessarily acted as agent of the United States. Demurrer to the indictments was sustained by the trial court. In holding that the demurrer was properly sustained, the Court said (p. 493):

> "As authorized by the Act of September 7, 1916, c. 451, 39 Stat. 728, the United States Shipping Board caused the Fleet Corporation to be organized (April 16, 1917) under laws of the District of Columbia with $50,000,000 capital stock, all owned by the United States, and it became an operating agency of that Board. Later, the President directed that the Corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917, c. 29, and he likewise authorized the Shipping Board to exercise through it another portion of such power and authority. See *The Lake Monroe,* 250 U.S. 246, 252. The Corporation was controlled and managed by its own officers and appointed its own servants and agents who became directly responsible to it. *Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity. Its inspectors were not appointed by the President, nor by any officers designated by Congress; they were subject to removal by the Corporation only and could contract only for it. In such circumstances we think they were not agents of the United States within the true intendment of Sec. 41.*"

In *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp.,* 258 U.S. 549, 66 L. Ed. 762, one

of the questions involved was whether a claim in bankruptcy made by the Fleet Corporation in its own name as an instrumentality of the Government was entitled to priority. The claim arose under a contract entered into by the Fleet Corporation "representing the United States of America" with the Eastern Shore Shipbuilding Corporation, which became bankrupt, for the construction of six harbor tugs prior to the Merchant Marine Act of 1920. In holding that the Fleet Corporation was not entitled to priority, the Court said (p. 570):

> "The third case, as we have said, is a claim of priority in bankruptcy. It was asserted against the estate of the Eastern Shore Shipbuilding Corporation, in the District Court for the Southern District of New York, under a contract similar to that last described, made by that Company with the Fleet Corporation 'representing the United States of America' to construct six harbor tugs. The claim was presented by the Fleet Corporation in its own name, but was put forward by it as an instrumentality of the Government of the United States. *It was denied successively by the referee, the District Court and the Circuit Court of Appeals on the ground that the Fleet Corporation was a distinct entity, and that, whatever might be the law as to a direct claim of the United States, the Fleet Corporation stood like other creditors and was not to be preferred.* 274 Fed. 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed."

In *Skinner & Eddy Corp. v. McCarl,* 275 U.S. 1, 72 L. Ed. 131, a petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia in October, 1924, on the relation of Skinner & Eddy

Corporation to compel the Comptroller General of the United States to pass upon the claims of that Corporation against the Government. The claims arose under contracts made during the years 1917, 1918, and 1919 with the Fleet Corporation. In most of the contracts reference was made to the Fleet Corporation as "representing the United States." The claims were presented to the Comptroller General for allowance because Skinner & Eddy wished to be in a position to use them as a credit if the United States should, as was threatened, sue on the contracts. This course was deemed necessary because Sec. 951 of the Revised Statutes provided:

> "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed. . . ."

The Comptroller General declined to consider the claims on the ground that he had neither the duty nor the power, and that the duty of passing upon them rested with the Shipping Board. The Supreme Court, in affirming a judgment of the Court of Appeals of the District of Columbia, which affirmed the Supreme Court of the District in dismissing the petition for a writ of mandamus, described the character of the claims and set forth the character of the Fleet Corporation as follows (p. 10):

> "The claims of Skinner & Eddy were mainly for the cancellation by the Fleet Corporation of contracts for the construction of vessels. The Government contends that the contract giving birth to the claims arose out of or was incident to the exercise by or

through the President of the powers conferred upon him by the statutes referred to in Sec. 2(c) of the Merchant Marine Act, 1920, and, hence, that the Shipping Board, and not the Comptroller General, has the power and duty to settle and adjust them and thus to allow or disallow any claims by way of credits or set-offs arising out of the contracts. Skinner & Eddy urge that their contracts were made by virtue of the power conferred upon the Fleet Corporation by the Shipping Act of 1916; that a controversy arising out of such contracts is not within Sec. 2(c) of the Merchant Marine Act, 1920; and that, hence, the Comptroller General had jurisdiction over its claims. We have no occasion to determine whether the contracts here in question were made under the original charter power of the Fleet Corporation or under the additional powers acquired by delegation from the President. Even if Sec. 2(c) has no application, because the contracts were not entered into pursuant to the power delegated by the President in 1917, it does not follow that the claims fall within the jurisdiction of the Comptroller General. *For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards; and the audit and control of its financial transactions is, under the general rules of law and the administrative practice, committed to its own corporate officers except so far as control may be exerted by the Shipping Board.*''

In *Continental Bank v. Rock Island Ry.*, 294 U.S. 648, 79 L. Ed. 1110, one of the questions involved was whether Reconstruction Finance Corporation, in a reorganization of a railroad under Section 77 of the Bankruptcy Act, could take over and liquidate collateral accepted by it as

security for loans to the bankrupt. Section 5 of the Reconstruction Finance Corporation Act, under the authority of which the loans were made, expressly empowered Reconstruction Finance Corporation to take over and liquidate collateral accepted by it as security for loans. In holding that Reconstruction Finance Corporation was not entitled to take over and liquidate the collateral accepted by it as security, the Court said (p. 684):

> "The Reconstruction Finance Corporation contends that Secs. 77 and 2(15) of the Bankruptcy Act must be limited by the provisions of Sec. 5 of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5), which empowers the corporation to take over and *liquidate* collateral accepted by it as *security. The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act.* The provisions and principles of enforcement of the Bankruptcy Act, including Sec. 77, are binding upon the Reconstruction Finance Corporation, in the absence of some pertinent statutory exception, as they are upon other corporations."

In *Reconstruction Finance Corp. v. Menihan,* 312 U.S. 81, 85 L.Ed. 595, the question involved was whether costs of suit could be allowed against Reconstruction Finance Corporation when that Corporation was the unsuccessful litigant in suit. In holding that Reconstruction Finance Corporation was liable for such costs, the Court said (p. 83):

"Rule 54(d) of the Rules of Civil Procedure provides that 'costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.' This provision was merely declaratory and effected no change of principle.

"The Reconstruction Finance Corporation is a corporate agency of the government, which is its sole stockholder. 47 Stat. 5; 15 U.S.C. 601. It is managed by a board of directors appointed by the President by and with the advice and consent of the Senate. The Corporation has wide powers and conducts financial operations on a vast scale. *While it acts as a governmental agency in performing its functions* (see *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32, 33), *still its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign. Sloan Shipyards Corp. v. United States Fleet Corporation,* 258 U.S. 549, 566, 567."

In *Cartwright v. United States* (C.C.A. 5), 146 F. 2d 133, Cartwright was indicted, and convicted of stealing property of the United States under 18 U.S.C.A., Sec. 82, which makes it an offense to steal "any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder." Section 82 was amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, to include "or any corporation in which the United States of America is a stockholder." Cartwright was indicted for stealing property of the United States, but the proof showed that the property belonged to Defense Plant Corporation. The Court, in reversing the judgment of conviction, held (p. 135):

"While therefore, the proof shows that an offense has been committed within the purview of Sec. 82, that is a taking of property of a corporation in which the United States is a stockholder, it shows also that that offense was not the offense charged in the first count, 'taking property of the United States.' The government's position that this is a mere technicality since the United States beneficially owned the stock of the corporation, and, therefore, must be considered to be the owner of its property, will not at all do. *The indictment statute recognizes, as the law generally does, the distinction between a corporation and the owners of its stock. The government, having chosen to allege that the property stolen was the property of the United States, did not discharge its burden of proof by showing as it did here, that it was not such property, but that, on the contrary, it belonged to the Defense Plant Corporation.* For the same reason it must be held that it failed to discharge its burden under Count 2 which charged that the concealed property was property of the United States, while the proof showed that it belonged to the corporation."

Defense Plant Corporation, like Defense Supplies, was created (6 F.R. 2971) by Reconstruction Finance Corporation pursuant to authority contained in Section 5d of the Reconstruction Finance Corporation Act, as amended.

At the time of the passage of the Transportation Act of 1940 (approved September 18, 1940), which includes Section 321(a), Congress had recognized, in statutes other than the one referred to in the case last cited, the distinction between the United States and its corporate instrumentalities and between the property of the United

States and that of such instrumentalities. This is discussed *infra,* pages 66-69 and some of the statutes are set out in Appendix B to this brief.

It is clear from the decisions that Defense Supplies, prior to its dissolution, was a corporate entity separate and distinct from the United States and from any of its departments or boards, and that the United States as owner of the stock of Reconstruction Finance Corporation, which in turn owned the stock of Defense Supplies, was not the owner of the property of Defense Supplies. While Defense Supplies was an instrumentality of the United States, as said in *Continental Bank v. Rock Island Ry., supra,* "it is none the less a corporation, limited by its charter and by the general law." And as said in *Reconstruction Finance Corp. v. Menihan, supra,* "its transactions are akin to those of private enterprises and the mere fact that it is an agency of the government does not extend to it the immunity of the sovereign." In fact, the transactions of Defense Supplies in buying and selling motor benzol and other commodities were more akin to those of private corporations than the activities of Reconstruction Finance Corporation.

There is nothing in its Charter or in the law under which it was created which makes property of Defense Supplies property of the United States. In fact, under the law (Reconstruction Finance Corporation Act) authorizing Reconstruction Finance Corporation to create Defense Supplies and other corporations, Congress evidently, because of the decisions hereinbefore referred to, recognized that property of Defense Supplies and similar corporations was not property of the United States because Congress specifically authorized the exemption of Defense

Supplies and its property, except real estate, from taxation. Property of the United States is exempt from taxation without any such law. The exemption provisions are embodied in Section 10 of the Reconstruction Finance Corporation Act as amended by the Act of June 10, 1941, 55 Stat. 248. The exemption provisions are included in 15 U.S.C.A., Section 610 (in 1945 Cumulative Annual Pocket Part), which Section, so far as here pertinent, provides:

> "The corporation [Reconstruction Finance Corporation], including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The exemptions provided for in the preceding sentence with respect to taxation (which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes) shall be construed to be applicable not only with respect to the Reconstruction Finance Corporation but also with respect to (1) the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company, the Rubber Reserve Company, and any other corporation heretofore or hereafter organized or created by the Reconstruction Finance Corporation under section 606b of this title, as amended, to aid the Government of the United States in its national-defense program, * * *. Such exemptions shall also be construed to be applicable to the loans made, and personal property owned, by the Reconstruction

Finance Corporation or by any corporation referred to in clause (1), (2) or (3) of the preceding sentence, but such exemptions shall not be construed to be applicable in any State to any buildings which are considered by the laws of such State to be personal property for taxation purposes. As amended June 10, 1941, c. 190, Sec. 3, 55 Stat. 248."

Likewise, under the general law the property of Defense Supplies was the property of that Corporation and not the property of its stockholder. See *Klein v. Board of Supervisors,* 282 U.S. 19, 75 L.Ed. 140, in which case the Court held (p. 24):

> "The appellant, pursuing his notion that shares of stock represent an interest in the property of the corporation, insists that if taxed at all he should be taxed only in the ratio of the property in the State to the entire property of the corporation; that to tax him for the whole value is to tax property outside of the jurisdiction of the State. *But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members. Donnell v. Herring-Hall-Marvin Safe Co.,* 208 U.S. 267, 273. *The stockholders in some circumstances can call on the corporation to account, but that is a very different thing from having an interest in the property by means of which the corporation is enabled to settle the account.*"

In *Rhode Island Trust Co. v. Doughton,* 270 U.S. 69, 70 L.Ed. 475, the Court stated the rule as follows (p. 81):

> "*The owner of the shares of stock in a company is not the owner of the corporation's property.* He

has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation have been paid and the assets are divided in accordance with the law of its creation. *But he does not own the corporate property.*"

The United States saw fit to create Defense Supplies because of the advantages inherent in doing business through corporations, and in such circumstances if there are any inherent disadvantages in such method of doing business those disadvantages should be assumed along with the advantages. Neither the corporation thus created, nor its stockholder should be heard to deny that it is a corporate entity separate and distinct from the United States as a means of escaping its obligations. Compare *Schenley Distillers Corp. v. United States,* decided January 2, 1946, 90 L.Ed. 217 (Advance Opinions No. 5), in which case the Court held (p. 219):

"While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."

To paraphrase what was held in *Reconstruction Finance Corp. v. Menihan, supra,* while Defense Supplies acted as a governmental agency in performing its functions, still its transactions were akin to those of private enterprises and the mere fact that it was an agency of the Government did not extend to it the immunities and privileges of the sovereign. It had only such immunities and privileges of the sovereign as Congress saw fit to grant it. Congress saw fit to grant it the immunity of the sovereign from taxation, but Congress did not grant it the immunity of the sovereign from paying full commercial rates for the transportation of its property.

THE MOTOR BENZOL WAS NOT MILITARY OR NAVAL PROPERTY OF THE UNITED STATES

Under the preceding heading it was shown that the motor benzol was not the property of the United States. Under the facts, the motor benzol involved in this case was not, at the time of its transportation, "military or naval property" regardless of whether it was owned by the United States or not. It was at most a strategic or critical material suitable for use in connection with other materials in the manufacture or production of cumene and ethyl benzene which were suitable for use in connection with still other materials, in the production or manufacture of 100 octane aviation gasoline, and for use in connection with still other materials in the manufacture or production of styrene, which in turn was suitable for use, in connection with still other materials, in the manufacture or production of synthetic rubber.

As to the motor benzol involved in this case, which ultimately found its way into or became a component or

constituent of 100 octane aviation gasoline, the following steps were taken:

Defense Supplies had to have the benzol processed to get industrial pure benzol because motor benzol is not suitable for use in the manufacture of cumene or ethyl benzene (Tr. 46). 40.56% of the industrial pure benzol produced by processing was sold by Defense Supplies to Wilshire Oil Company and Richfield Oil Corporation to be used in the manufacture of cumene (Tr. 48-49). Those companies manufactured cumene by combining the pure benzol with propylene to produce by chemical reaction cumene (Tr. 49). The cumene thus produced was used by them to produce 100 octane aviation gasoline by combining the cumene with another component or other components by blending operation, thereby producing 100 octane aviation gasoline (Tr. 51). The gasoline thus produced was sold by Wilshire Oil Company and Richfield Oil Corporation to Defense Supplies (Tr. 51), and the latter corporation sold some of the 100 octane gasoline to the Army and some of it to the Navy (Tr. 52). The balance of the industrial pure benzol (59.44%) was sold by Defense Supplies to Rubber Reserve Company to be used in the manufacture of styrene (Tr. 49). Rubber Reserve Company had to make ethyl benzene first, which is accomplished by combining benzol with ethylene by chemical reaction (Tr. 49). Rubber Reserve Company sold a portion of this ethyl benzene (the quantity produced from 36.38% of the industrial pure benzol processed and produced from the 944,032 gallons of motor benzol transported) to refineries engaged in producing 100 octane aviation gasoline for use in producing such gasoline (Tr. 50). Those refineries produced 100 octane aviation gasoline by com-

bining the ethyl benzene with another component or other components by blending operations, thereby producing 100 octane aviation gasoline and they sold the gasoline thus produced to Defense Supplies (Tr. 51). The latter Corporation sold a part of this 100 octane aviation gasoline to the Army and a part of it to the Navy (Tr. 52).

As to the motor benzol in this case, which ultimately found its way into or became a component or constituent of rubber products, the following steps were taken:

Defense Supplies had to have the benzol processed to get industrial pure benzol because motor benzol is not suitable for use in the manufacture of ethyl benzene or styrene (Tr. 46). Defense Supplies sold to Rubber Reserve Company 59.44% of the industrial pure benzol obtained by processing the motor benzol (Tr. 49). Rubber Reserve Company first produced ethyl benzene by combining the benzol with ethylene by chemical reaction (Tr. 49). A portion of the ethyl benzene was used in the production of 100 octane gasoline as stated in the preceding paragraph (Tr. 50). The balance of the ethyl benzene (the quantity produced from 23.06% of the industrial pure benzol processed and produced from the 944,032 gallons of motor benzol transported) was used by Rubber Reserve Company in producing styrene, which is produced from ethyl benzene by chemical reaction in the presence of a catalyst (Tr. 49-50). The styrene thus produced was sold by Rubber Reserve Company to rubber companies for use in the production of synthetic rubber (Tr. 50). Synthetic rubber was produced by combining through chemical reaction styrene and butadiene in the presence of a catalyst (Tr. 50). The rubber companies either used the synthetic rubber to manufacture rubber products, or

sold it to other companies for the manufacture of rubber products (Tr. 50). The manufacturers of rubber products sold part of them to the Army and a part to the Navy (42% of the products to the Army and Navy) for their use, and the balance (58%) was sold for civilian use (Tr. 50).

In the circumstances here presented the motor benzol was not, at the time of its transportation, "military or naval property" regardless of whether it was owned by the United States or not. In fact, it never was military or naval property of the United States—it was merely a material which ultimately became a part of property subsequently acquired by the United States for military or naval use. The products of which the motor benzol ultimately became a part were military or naval property of the United States only after such products were acquired by the United States through its War and Navy Departments for the use of the Army and Navy respectively, with money appropriated by Congress for that purpose. In other words, when the War and Navy Departments purchased the 100 octane aviation gasoline from Defense Supplies the 100 octane aviation gasoline became military and naval property of the United States. Likewise, when the War and the Navy Departments purchased the rubber products, of which a portion of the motor benzol ultimately became a constituent part, for their use, with money appropriated by Congress for that purpose, such products became military and naval property of the United States.

Under Article I, Section 8, Clauses 12 and 13, respectively, of the Constitution of the United States, Congress is empowered "to raise and support Armies, but no Ap-

propriation of Money to that Use shall be for a longer Term than two Years," and "To provide and maintain a Navy."

In pursuance of this power Congress from time to time makes appropriations to raise and support armies and to provide and maintain a navy. By these appropriations, Congress provides money for the purpose of acquiring military property for the Army and naval property for the Navy. The appropriation acts are in great detail, appropriations being made for the various branches of service in the Army, and for the various branches of service in the Navy. For example, as to the Navy, see Naval Appropriation Act of 1944 (57 Stat. 197-218) making appropriations for the Navy Department for the fiscal year ending June 30, 1944; and as to the Army, see Military Appropriation Act 1944 (57 Stat. 347-370), making appropriations for the Military Establishment for the fiscal year ending June 30, 1944. Included in the Naval Appropriation Act is an appropriation of $4,583,725,000 for "Bureau of Aeronautics," "Aviation, Navy" (57 Stat. 206), and included in the Military Appropriation Act is an appropriation of $23,655,481,000 for the "Air Corps," "Air Corps, Army" (57 Stat. 356).

10 U.S.C.A., Section 1191 provides:

> "All purchases and contracts for supplies or services for the military service shall be made by or under the direction of the chief officers of the Department of War. And all agents or contractors for supplies or services as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the General Accounting Office."

There is a similar provision governing purchases and contracts for supplies or services for the naval service. See 34 U.S.C.A., Section 560. The authority conferred by the sections referred to is subject to certain limitations such as the necessity of advertisement for bids. See 10 U.S.C.A., Section 1201 and 34 U.S.C.A., Section 561.

Of course the United States can acquire military or naval property through any department or agency authorized by Congress to acquire such property with money appropriated by Congress for that purpose. Congress, however, appropriated money to the War Department or Military Establishment for the purpose of acquiring military property for military use, and it appropriated money to the Navy Department or Naval Establishment for the purpose of acquiring naval property for naval use, and Congress has also designated those who shall have authority to make purchases of supplies and other property for the Military and Naval Establishments.

By Executive Order No. 9001 (6 F.R. 6787), dated December 27, 1941, the President removed restrictions upon the authority of the Secretary of War and the Secretary of the Navy to enter into contracts. This Executive Order, so far as is pertinent to this discussion, is as follows:

> "1. By virtue of the authority in me vested by the Act of Congress, entitled 'An Act to expedite the prosecution of the War effort,' approved December 18, 1941, (hereinafter called 'the Act') and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are

authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modification of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. *The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.*

"2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form."

Thus, by Executive Order 9001 the Secretary of War and the Secretary of the Navy were authorized, within the limits of the amounts appropriated therefor, to enter into contracts for the purchase of military and naval property for their respective Departments without observing the usual formalities and restrictions applicable to the purchase by them or their Departments of such military or naval property. In addition the Secretary of War and the Secretary of the Navy may exercise the authority conferred or they may, in their discretion, authorize any other officer or officers or civilian officials of the War or the Navy Department, respectively, to exercise such authority. Neither the Secretary of War nor the Secretary of the Navy was authorized to delegate to Defense Supplies the authority conferred upon him by Executive Order No. 9001.

It appears from the facts in this case that the contract of May 20, 1943, under which the War and Navy Departments acquired the 100 octane aviation gasoline, of which a portion of the motor benzol involved in this case ultimately became a constituent or component, was signed for the War Department by the Under Secretary of War and for the Navy Department by the Under Secretary of the Navy (Tr. 170). In so far as the rubber products, of which a portion of the motor benzol involved in this case became an element or component part, it appears that they were acquired direct from the rubber manufacturers by the War and Navy Departments and not through Defense Supplies (Tr. 50).

In the circumstances here presented the 100 octane aviation gasoline, of which a portion of the motor benzol in

this case became a constituent part, was not military or naval property of the United States until it was purchased by the United States through its War and Navy Departments from Defense Supplies for the use of the Army and the Navy. Likewise, the rubber products, of which a portion of the motor benzol ultimately became a constituent part, did not become military or naval property of the United States until they were purchased by the United States through its War and Navy Departments from the manufacturers for military and naval use.

The fact that the disposition and use of motor benzol was subject to Conservation Order M-137 (Tr. 41); that the manufacture, use and disposition of cumene and ethyl benzene were under the control and administration of the Petroleum Administration for War (Tr. 51); that the purchase of gasoline by the Army and Navy from Defense Supplies was subject, as to quantity and end user to determinations and allocations by the Allied Petroleum Products Aviation Committee and as to refinery source, to release by Petroleum Administration for War (Tr. 163); that industrial pure benzol was sold by Defense Supplies to Wilshire Oil Company and Richfield Oil Corporation for the manufacture of cumene for use as directed by the United States Government (Tr. 86, 88); and that industrial pure benzol was sold by Defense Supplies to Rubber Reserve Company for the manufacture of styrene for use as directed by the United States Government (Tr. 91), is without significance in determining whether the motor benzol was, at the time of its transportation, military or naval property of the United States. It is a matter of common knowledge that the Government, during the

war subjected the sale, delivery and use of many commodities to restrictions such as were imposed upon the disposition and use of motor benzol (benzene). Many of these commodities were just as important to the war effort as motor benzol and many were less important. The Federal Register contains many general conservation orders, allocation orders, limitation orders, and preference orders. There were hundreds of such orders in the Federal Register and they were designed to control the sale, delivery, and use of the articles and commodities covered thereby just as Conservation Order M-137 was designed to control the sale, delivery and use of motor benzol. For the purpose of indicating the wide scope of these orders, reference is made here to several of them.

As General Conservation Order M-137 imposed restrictions upon the delivery and use of benzene or benzol, so General Conservation Order M-126 (7 F.R. 3364) imposed restrictions upon the use of iron and steel. This Order, like Order M-137 dealing with motor benzol, began as follows:

> "The fulfillment of requirements for defense of the United States has created a shortage in the supply of iron and steel for defense, for private account and for export; and the following Order is deemed necessary and appropriate in the public interest and to promote the national defense."

Conservation Order M-145 dealt with cocoa and imposed restrictions upon the processing of cocoa beans and upon the delivery and use of any material produced from cocoa beans in connection with the production for sale of a number of products. This order as amended December 5, 1942 (7 F.R. 10213), began as follows:

"The uncertainty of shipments of cocoa beans from abroad and the fulfillment of requirements for the defense of the United States have created a shortage of the supply of cocoa beans for defense, for private account, and for export; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

Conservation Order M-111, dealing with tea, illustrates just how far the Government went in imposing restrictions. This Order, as amended on January 7, 1943 (8 F.R. 313), began as follows:

"The uncertainty of shipments of tea from abroad and the fulfillment of requirements for the defense of the United States have created a shortage of the supply of tea for defense, for private account, and for export, and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

Paragraph (c) of Section 1134.1 imposed general restrictions as follows:

"(c) General restrictions. (1) No packer shall accept delivery of tea or deliver tea packed by him or in bulk, except as permitted by this order.

"(2) No wholesale receiver shall accept delivery of tea from any person nor resell tea, except as permitted by this order.

"(3) No person shall accept delivery of tea from any packer, and no person shall deliver tea to any packer or wholesale receiver, with knowledge or reason to believe that such packer is not entitled to deliver, or that such packer or wholesale receiver is not entitled to accept delivery of, such tea pursuant to this order.

"(4) Every packer and every wholesale receiver shall sell tea equitably to purchasers and shall not favor purchasers who buy other products from them nor discriminate against purchasers who do not buy other products from them."

There were other restrictions imposed by this order, including quota restrictions and exceptions thereto, and restrictions on inventories. Paragraph (h) contained a limitation on the size of packages as follows:

"No packer shall pack tea for sale at retail in a package or container containing more than one-fourth of one pound of tea."

and also a limitation of the size of tea bags or tea balls.

It is not practicable within the limits of this brief to show fully the scope of the limitations and restrictions imposed by the United States upon the sale, delivery and use of most materials and commodities. The mere enumeration of the materials and commodities subject to limitations and restrictions as to sale, delivery and use similar to those applicable to motor benzol (benzene), and the various conservation orders, allocation orders, limitation orders, preference orders, and directives applicable to them, would take too much space to be included in this brief. The particular orders referred to, however, serve to show in a general way the scope of the control exercised by the United States over the sale, delivery and use of materials and commodities which had some relation to the defense effort, and they also serve to show that these limitations and restrictions have no significance in determining whether property is military or naval property.

THE MOTOR BENZAL WAS NOT, AT THE TIME OF ITS TRANSPORTATION, MOVING FOR MILITARY OR NAVAL USE

The Stipulation of Facts shows that the motor benzol, at the time of transportation, was not moving for military or naval use. The Executive Committee of Defense Supplies, by its resolution, authorized the purchase and storage of the motor benzol, and the making of arrangements for the "processing and disposition of such motor benzol and by-products resulting therefrom" (Tr. 33-34). After the motor benzol was transported it was stored under the terms of a contract between Defense Supplies and Wilshire Oil Company (Tr. 43). It was then processed to get industrial pure benzol, which was suitable for use, along with other components or elements, in the manufacture of cumene or ethyl benzene (Tr. 46). After it was processed Defense Supplies sold the industrial pure benzol (Tr. 47). Neither the storage nor processing nor sale of the motor benzol was a military or naval use of it. The sale of property and the use of property are entirely different transactions. This has been emphasized particularly in connection with sales and use taxes. See *McLeod v. Dillworth Company,* 322 U.S. 327, 88 L. Ed. 1304, in which case the Court held (p. 330):

> "A *sales tax* and a *use tax* in many instances may bring about the same result. *But they are different in conception, are assessments upon different transactions,* and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds."

The Court also held (p. 331):

> "Though *sales and use taxes* may secure the same revenues and serve complementary purposes, *they are,*

as we have indicated, taxes on different transactions . . ."

The facts show that the motor benzol was not suitable for military or naval use and was never put to either military or naval use. Therefore, there was no movement of the motor benzol for military or naval use. The motor benzol had to be processed to get industrial pure benzol, which was a material suitable for use, in connection with other materials, in the manufacture or production of cumene and ethyl benzene (Tr. 46). Cumene is produced by combining industrial pure benzol with propylene by chemical reaction (Tr. 49). Ethyl benzene is produced by combining benzol with ethylene by chemical reaction (Tr. 49). Styrene is produced from ethyl benzene by chemical reaction in the presence of a catalyst (Tr. 49). Cumene and ethyl benzene are components of 100 octane aviation gasoline by blending operations which comprise a physical mixture without chemical change (Tr. 51). Synthetic rubber is produced by combining, through chemical reaction, styrene and butadiene in the presence of a catalyst (Tr. 50).

There was no property suitable for military or naval use prior to the manufacture or production of 100 octane aviation gasoline and of rubber products from the synthetic rubber. The 100 octane aviation gasoline and the manufactured rubber products became military or naval property of the United States only when they were purchased by the United States through its War and Navy Departments for use by the Army and Navy. When the aviation gasoline and rubber products, of which the motor benzol ultimately became a constituent part, were acquired

by the United States through its War and Navy Departments for their use, the transportation of the aviation gasoline and the rubber products thereafter for use of the Army and Navy was a movement of military or naval property for military or naval use.

Assuming, however, that the movement of a material, in itself unsuitable for military or naval use, for storage, processing and sale to others for use by them, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, is a movement for use, it would obviously not be a movement for military or naval use. The storage of a material, unsuitable for military or naval use, is not a military or naval use of the material. Likewise, processing of such material to get a material, still unsuitable for military or naval use, is not a military or naval use of the material. Also, the sale of the material resulting from the processing was not a military or naval use of the processed material even though such material was used by the purchaser, in connection with still other materials, in the manufacture or production of property suitable for military or naval use, which property was ultimately acquired by the United States for military or naval use.

THE MOTOR BENZOL WAS NEITHER "PROPERTY OF THE UNITED STATES" NOR "MILITARY OR NAVAL PROPERTY OF THE UNITED STATES" AND IT WAS NOT "MOVING FOR MILITARY OR NAVAL USE" WITHIN THE MEANING OF THAT LANGUAGE AS USED IN SECTION 321(a).

On September 18, 1940, the Transportation Act of 1940, which includes in Title III, Part II, Section 321 (Act of

September 18, 1940, c. 722, 54 Stat. 954; 49 U.S.C.A., Sec. 65 in 1945 Cumulative Pocket Part), was approved. Section 321(a), so far as it is pertinent to this discussion, provides:

> "Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; . . ."

By Section 321(b) carriers by railroad aided by land grants received from the United States are not entitled to the benefits of Section 321(a) unless and until they have filed releases of certain claims against the United States in the form and manner prescribed by the Secretary of the Interior. Each of the land-grant aided carriers participating in the transportation of the motor benzol involved in this case, as well as each of the land-grant aided carriers with which any of the participating carriers agreed to equalize the lowest net rates lawfully available as derived through deductions on account of land-grant mileage or distance, filed such release prior to the shipments of motor benzol (Tr. 45). Therefore each of the carriers participating in the transportation involved in this case was entitled to the benefits of Section 321(a).

By Section 321, Title III, Part II, of the Transportation Act of 1940, the United States made a proposal to each carrier by railroad whose lines were constructed as a whole or in part with the aid of grants of land received from the United States either directly or through a predecessor or predecessors in interest, and each of the carriers by railroad whose lines were so constructed accepted the proposal by filing the releases in the manner and form required by Section 321(b). Upon acceptance of this proposal there resulted a contract between each of such carriers by railroad and the United States, under the terms of which each of said carriers became entitled to the full applicable commercial rates, fares and charges for transportation of any persons or property for the United States, or on its behalf, other than "military or naval property of the United States moving for military or naval and not for civil use."

In *United States v. Northern Pacific Ry. Co.,* 256 U.S. 51, 65 L. Ed. 825, the Court, referring to the Northern Pacific Railroad Act of July 2, 1864 (13 Stat. 365), and the Joint Resolution of May 31, 1870 (16 Stat. 378), held (p. 63):

> "The purpose of the granting act and resolution was to bring about the construction and operation of a line of railroad extending from Lake Superior to Puget Sound and Portland through what then consisted of great stretches of homeless prairies, trackless forests and unexplored mountains, and thus to facilitate the development of that region, promote commerce, and establish a convenient highway for the transportation of mails, troops, munitions and public stores to and from the Pacific coast, with all the resultant advantages to the Government and the

public. To that end the *act and resolution embodied a proposal to the company to the effect that if it would undertake and perform that vast work it should receive in return the lands comprehended in the grant. The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government.''*

In the case last cited the Government made grants of land in aid of construction in consideration of receiving concessions from established tariffs. By Section 321 the Government surrendered in part concessions from established tariffs in consideration of the carriers releasing certain rights and claims to the Government. In each case there resulted contracts obligatory both on the carriers and on the Government. The resulting contracts are binding on the United States and it cannot, without the consent of the interested carriers, change the terms of these contracts by any subsequent legislation. See *United States v. Central Pacific R.R. Co.,* 118 U.S. 235, 238, 30 L. Ed. 173.

In *United States v. Galveston, etc. Ry. Co.,* 279 U.S. 401, 73 L. Ed. 760, the Court stated the rule to be applied in construing contracts of this character. In that case the question involved was whether the Government was entitled to the benefit of land-grant deductions from tariff rates for the transportation of authorized mounts furnished by army officers and transported at the expense of the United States. It was held that such mounts were not property of the United States within the meaning of the land-grant acts, and that the Government was not en-

titled to deductions on account of land grants from the regular tariff rates. In so holding the Court said (p. 404):

> "The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.*"

In *Lake Superior and M. R.R. Co. v. United States,* 93 U.S. 442, 23 L. Ed. 965, the terms of the obligation were "sensibly and fairly read according to the words employed and not expanded or restricted by construction." In that case the question involved was whether the Government was entitled to have troops or property transported over the railroad by the railroad company free of charge under a provision in an act of Congress granting lands to aid in the construction of the railroad, that "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charges, for the transportation of any property or troops of the United States." It was held that the reservation in question secured to the Government only the free use of the railroad concerned and that it did not entitle the Government to have troops or property transported by the railroad company over its railroad free of charge. In so holding the Court said (p. 454):

> "It might be very convenient for the government to have more rights than it has stipulated for; but we are on a question of construction, and on this ques-

> tion the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable."

The terms of the obligation were "sensibly and fairly read according to the words employed and not expanded or restricted by construction" when in *Southern Pacific Co. v. United States,* 285 U.S. 240, 76 L. Ed. 736, it was held that engineer officers of the United States Army are not troops of the United States when they are assigned to duty in connection with the improvement of rivers and harbors, or the work of the California Debris Commission, and that the Government was not entitled to land-grant deductions upon their transportation.

The terms of the obligation were "sensibly and fairly read according to the words employed and not expanded or restricted by construction" in *United States v. Union Pacific R.R. Co.,* 249 U.S. 354, 63 L. Ed. 643, when it was held (p. 360):

> "The furloughed soldier is, of course, a part of the Army or troops of the United States; but his transportation back to the proper station is not 'transportation of troops' within the meaning of the land-grant acts."

Thus in construing contracts of this character the "terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction." Such contracts are not to be construed so as to give the Government more rights than those for which it has stipulated. Furthermore, it is not the function of the courts to revise a contract which the Government draws on the ground that a more prudent one might have been made, or to supply omissions which

are assumed to exist. In other words, it is the function of the courts, in construing contracts of this character, to ascertain and give effect to the intention of the parties as in the case of contracts between private parties.

It is clear, therefore, that the motor benzol in this case was neither "property of the United States," nor "military or naval property of the United States," nor "military or naval property of the United States moving for military or naval use" within the language of Section 321(a), unless the term "United States" as used in Section 321 was intended by the parties to include corporate instrumentalities of the United States such as Defense Supplies.

In the case of these contracts made in pursuance of Section 321, as in the case of contracts between individuals, the intention of the parties must be sought in the language used. There is nothing in the language of Section 321 to indicate that the parties intended that the term "United States" should include its corporate instrumentalities such as Defense Supplies.

Section 322 (Act of September 18, 1940, c. 722, 54 Stat. 955; 49 U.S.C.A., Sec. 66 in 1945 Cumulative Pocket Part), enacted as a part of Title III, Part II, of the Transportation Act of 1940, on the contrary, indicates that it was not the intention to include such corporate instrumentalities in the term "United States." Section 322 provides:

> "Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presen-

tation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

Thus Section 322 requires payment for transportation of property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act "prior to audit or settlement by the General Accounting Office." The "payment" required by Section 322 can have reference only to "payment" for transportation of the property of the United States and not for the transportation of property of corporate instrumentalities of the United States such as Defense Supplies. At all times material to this action the accounts of Defense Supplies were neither audited nor settled by the General Accounting Office (Tr. 33). Furthermore, Section 322 specifically reserves to the United States Government the right "to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." This right is reserved only to the United States Government. Defense Supplies and like corporations are instrumentalities of the United States Government but they are not the United States Government nor any part thereof.

Thus there is nothing in the contracts made by the United States and the carriers by railroad in conformity with Section 321 to indicate an intention on the part of the parties that the term "United States" as used in Section 321 included corporate instrumentalities of the United States such as Defense Supplies. On the contrary,

when the provisions of Section 321 are read in connection with those of Section 322 it is clear that it was not the intention of the parties that the term "United States" should include such corporate instrumentalities as Defense Supplies.

Furthermore, at the time of the enactment of the Transportation Act of 1940, the term "United States" did not include such corporate instrumentalities. Under the decisions such instrumentalities were held to be entities separate and distinct from the United States and from its departments or boards. Such corporations, though instrumentalities of the United States, were held to be akin to private corporations governed by their charters and the general law. These cases have been referred to *supra,* pages 30-35, but for convenience, brief reference will again be made to some of them.

Thus, in *United States v. Strang, supra,* the Court, referring to the Emergency Fleet Corporation, held (p. 493):

> *"Notwithstanding all its stock was owned by the United States it must be regarded as a separate entity."*

In *Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corp., supra,* with reference to a claim in bankruptcy for priority made by the Fleet Corporation in its own name as an instrumentality of the Government, the Court held (p. 570):

> "It was denied successively by the referee, the District Court and the Circuit Court of Appeals *on the ground that the Fleet Corporation was a distinct entity,* and that, whatever might be the law as to a direct claim of the United States, the Fleet Cor-

poration stood like other creditors and was not to be preferred. 274 Fed. 893. The considerations that have been stated apply even more obviously to this case. The order is affirmed."

In *Skinner & Eddy Corp. v. McCarl, supra,* the Court, referring to the Emergency Fleet Corporation, held (p. 11):

> *"For the Fleet Corporation is an entity distinct from the United States and from any of its departments or boards;"*

In *Lindgren v. U. S. Shipping Board Merchant Fleet Corp.* (C.C.A. 4), 55 F. (2d) 117, certiorari denied 286 U.S. 542, 76 L. Ed. 1280, the Court, referring to the Fleet Corporation, held (p. 12):

> *"Although the United States owns its stock, it is a distinct entity just as other corporations are distinct from their stockholders."*

In *Continental Bank v. Rock Island Ry., supra,* the Court held, in respect of Reconstruction Finance Corporation, which created Defense Supplies pursuant to authority given by Congress (p. 684):

> *"The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law."*

It is clear from the decisions that at the time of the enactment of the Transportation Act of 1940 such corporate instrumentalities as Defense Supplies were corporate entities separate and distinct from the United

States and from its departments or boards and that the United States, as owner of the stock of Reconstruction Finance Corporation, which in turn owned the stock of Defense Supplies, was not the owner of the property of Defense Supplies. In line with the cases cited Congress has shown in other enactments that it regarded such corporate instrumentalities of the United States as entities separate and distinct from the United States and that the United States was not the owner of the property of such corporations. Thus, 46 U.S.C.A., Sec. 741 (Section 1 of the Act of March 9, 1920, c. 95, 41 Stat. 525) provides:

> "No vessel owned by the United States *or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock* or in the possession of the United States or *of such corporation* or operated by or for the United States or *such corporation,* and *no cargo owned or possessed by the United States or by such corporation,* shall, in view of the provision herein, made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possession: *Provided,* That this chapter shall not apply to the Panama Railroad Company."

Section 2 of the War Department Civil Appropriation Act, 1941, approved June 24, 1940 (54 Stat. 505, 511), provides:

> "No part of any appropriation contained in this act shall be used directly or indirectly after May 1, 1941, except for temporary employment in case of emergency, for the payment of any civilian for services rendered by him on the Canal Zone while occupying a skilled, technical, clerical, administrative, executive, or supervisory position unless such a person is

a citizen of the United States of America or of the Republic of Panama: *Provided, however, . . .*"

and there follows six numbered provisions, the sixth of which is as follows:

"(6) this entire section shall apply only to persons *employed* in skilled, technical, clerical, administrative, executive, or supervisory positions on the Canal Zone *directly or indirectly by any branch of the United States Government or by any corporation or company whose stock is owned wholly or in part by the United States Government: Provided further,* that the President may suspend compliance with this section in time of war or national emergency if he should deem such course to be in the public interest."

Thus Congress had indicated at the time of the passage of the Transportation Act of 1940 that the term "United States" as used by it in its enactments did not include such corporate instrumentalities of the United States as Defense Supplies; that such corporations are entities separate and distinct from the United States and from its departments or boards, and that the property of such corporate instrumentalities is not the property of the United States. When Congress has intended that such corporate instrumentalities should be accorded the same treatment as the United States it has used specific words indicating such intent. That this indicates the intention of Congress, see *United States v. Strang, supra,* in which case the Court held (p. 493):

"Generally agents of a corporation are not agents of the stockholders and cannot contract for the latter. Apparently this was one reason why Congress authorized organization of the Fleet Corporation. *Bank of*

the United States v. Planters' Bank of Georgia, 9 Wheat. 904, 907, 908; *Bank of Kentucky v. Wister,* 2 Pet. 318; *Briscoe v. Bank of Kentucky,* 11 Pet. 257; *Salas v. United States,* 234 Fed. Rep. 842. *The view of Congress is further indicated by the provision in Sec. 7, Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 384, 'Provided, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section.'* Also, by the Act of October 23, 1918, c. 194, 40 Stat. 1015, which amends Sec. 35, Criminal Code, and renders it criminal to defraud or conspire to defraud a corporation in which the United States own stock.''

There are other statutes, enacted prior to September 18, 1940, the date on which the Transportation Act of 1940 was approved, in which Congress recognized the distinction between the United States and its corporate instrumentalities such as Defense Supplies, and showed that it regarded such corporate instrumentalities as entities separate and distinct from the United States and from its departments or boards, and that the property of such corporate instrumentalities is not the property of the United States. Among such statutes are the following:

Section 6 of the Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 383;

18 U.S.C.A., Sec. 76 (in 1945 Cumulative Annual Pocket Part); Sec. 80 (in 1945 Cumulative Annual Pocket Part); Sec. 82 (in 1945 Cumulative Annual Pocket Part); Secs. 83, 84, and 85;

5 U.S.C.A., Sec. 59a(a) (in 1945 Cumulative Annual Pocket Part); Sec. 134d (in 1945 Cumulative Annual Pocket Part);

28 U.S.C.A., Sec. 870 (in 1945 Cumulative Annual Pocket Part).

For convenience of the Court the statutes above referred to are set forth in Appendix B hereto.

Thus, at the time Congress made to carriers the proposal embodied in Section 321(a), under the terms of which the carriers are entitled to the full commercial rates for the transportation of property for the United States, or on its behalf, other than "military or naval property of the United States moving for military or naval and not for civil use," the term "United States" did not include such corporate instrumentalities of the United States as Defense Supplies. Such corporations were entities separate and distinct from the United States and from its departments or boards and their property was not the property of the United States. Therefore, in the contract which resulted from the acceptance by the carriers of the proposal made by Congress, the term "United States" as used in such contract did not include Defense Supplies and the motor benzol involved in this case was neither "property of the United States" nor "military or naval property" of the United States within the meaning of that language as used in Section 321(a).

Just as Congress had, at the time of the passage of the Transportation Act of 1940 (approved September 18, 1940), which includes Section 321(a), recognized the distinction between the United States and its corporate instrumentalities such as Defense Supplies and between the property of the United States and that of its corporate instrumentalities, so Congress had recognized the

distinction between military or naval property and the materials which are necessary for the manufacture of such property. Thus, Section 6 of the Act of July 2, 1940 (54 Stat. 712), provides:

> "Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. * * *"

The quoted provision also demonstrates that when Congress intends to include materials necessary for the manufacture of military or naval property it uses apt language to indicate such intention. Had Congress intended to include the materials necessary for the manufacture of military or naval property along with military or naval property in Section 321(a), and to reserve to the United States the right to make land-grant deductions from the commercial charges for the transportation of materials necessary for the manufacture of military or naval property along with military or naval property, Congress undoubtedly would have used apt language to indicate such intention.

It is clear that the motor benzol was not, at the time of its transportation, "property of the United States" and was not "military or naval property of the United States" within the meaning of that language as used

in Section 321(a). Being neither "property of the United States" nor "military or naval property of the United States" within the meaning of that language as used in Section 321(a), it was not "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of that language as used in Section 321(a).

Assuming *arguendo* that the motor benzol was property of the United States, it was not, as hereinbefore shown, under the facts of this case, military or naval property of the United States. The motor benzol was never applied to a military or naval use. In fact, it was not suitable for such use. At most it was a strategic or critical material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane aviation gasoline and of styrene for use, in connection with still other materials, in the manufacture or production of synthetic rubber. The 100 octane aviation gasoline was suitable for military or naval use and the synthetic rubber was suitable for use in the manufacture or production of rubber products suitable for military or naval use, and the 100 octane aviation gasoline and rubber products became military or naval property of the United States only when they were acquired by the United States through its War and Navy Departments for use by the Army and Navy.

Likewise, as hereinbefore shown, the motor benzol, at the time of its transportation, was not moving for military or naval use. The stipulation of facts shows that at the time of its transportation the motor benzol was moving for storage, processing and disposition. The motor benzol was

stored, processed and sold and ultimately was used in the manufacture and production of property which was ultimately acquired by the United States through its War and Navy Departments for the use of the Army and Navy. Movement of the motor benzol for storage, processing and sale was not a movement for military or naval use though ultimately the motor benzol became a component of products suitable for military or naval use.

CONCLUSION

In conclusion we submit that:

1. The motor benzol involved in this case was not property of the United States, but of Defense Supplies, a corporate entity separate and distinct from the United States.

2. The motor benzol was not military or naval property of the United States.

3. The motor benzol was not, at the time of its transportation, moving for military or naval use, but for storage, processing and sale.

4. The motor benzol was neither "property of the United States" nor "military or naval property of the United States" and it was not "moving for military or naval use" within the meaning of that language as used in Section 321(a).

5. The motor benzol was, at the time of its transportation, only a material suitable for use, in connection with other materials, in the manufacture or production of materials suitable for use, in connection with still other materials, in the manufacture or production of 100 octane

aviation gasoline and of styrene for use, in connection with still other materials, in the manufacture or production of synthetic rubber.

6. The property of which the motor benzol ultimately became a constituent part was not "military or naval property of the United States" until it was purchased by the United States through its War and Navy Departments from Defense Supplies for the use of the Army and Navy.

7. Defense Supplies was not entitled to the benefit of land-grant deductions reserved only to the United States in Section 321(a) for the transportation of "military or naval property of the United States moving for military or naval and not for civil use."

8. Appellant is entitled to recover from Appellee the sum of $23,049.51, with interest thereon.

Respectfully submitted,

C. O. Amonette,
Charles W. Burkett, Jr.,
Attorneys for Appellant.

Dated at San Francisco, California,
August 7, 1946.

(APPENDIX FOLLOWS)

APPENDIX A

Section 321 of Title III, Part II, of the Transportation Act of 1940 (49 U.S.C.A., Sec. 65 in 1945 Annual Cumulative Pocket Part) provides:

"SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided, further,* That section 3709, Revised Statutes (U.S.C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad

operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though sub-section (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

APPENDIX B

Section 6 of the Appropriation Act of October 6, 1917, c. 79, 40 Stat. 345, 383, so far as here pertinent, provides:

> "That section five of the Act of June twenty-second, nineteen hundred and six, prohibiting the transfer of employees from one executive department to another, shall apply with equal force and effect to the transfer of employees from the executive departments to independent establishments and vice versa and to the transfer of employees from one independent establishment to another: *Provided, That the United States Shipping Board Emergency Fleet Corporation shall be considered a Government establishment for the purposes of this section.*"

18 U.S.C.A., Sec. 76 (in 1945 Cumulative Annual Pocket Part) provides:

> "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee *acting under the authority of the United States,* or any department, or any officer of the Government thereof, *or under the authority of any corporation owned or controlled by the United States,* and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any department or any officer of the Government thereof, or any corporation owned or controlled by the United States, any money, paper, document, or other valuable thing, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

18 U.S.C.A., Sec. 80 (in 1945 Cumulative Annual Pocket Part) provides:

> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, *to or by any person or officer in the civil, military, or naval service of the United States,* or any department thereof, *or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States,* or any department or officer thereof, *or any corporation in which the United States of America is a stockholder,* knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of *any department or agency of the United States or of any corporation in which the United States of America is a stockholder,* shall be fined not more than $10,000 or imprisoned not more than ten years or both."

18 U.S.C.A., Sec. 82 (in 1945 Cumulative Annual Pocket Part) provides:

> "Whoever shall take and carry away or take for his use, or for the use of another, with intent to steal or purloin, or shall wilfully injure or commit any depredation against, *any property of the United States,* or any branch or department thereof, *or any corporation in which the United States of America is a stockholder,* or any property which has been or is

being made, manufactured, or constructed under contract for the War or Navy Departments of the United States, shall be punished as follows: If the value of such property exceeds the sum of $50, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the value of such property does not exceed the sum of $50, by a fine of not more than $1,000 or by imprisonment in a jail for not more than one year, or both. Value, as used in this section, shall mean market value or cost price, either wholesale or retail, whichever shall be the greater."

18 U.S.C.A., Sec. 83, provides:

"Whoever shall enter into any agreement, combination, or conspiracy to defraud the *Government of the United States,* or any department or officer thereof, *or any corporation in which the United States of America is a stockholder,* by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A., Sec. 84, provides:

"Whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property used or to be used in the military or naval service, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud *the United States,* or any department thereof, *or any corporation in which the United States of America is a stockholder,* shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A., Sec. 85, provides:

"Whoever, having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, with intent to defraud *the United States,* or any department thereof, *or any corporation in which the United States of America is a stockholder,* or wilfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

5 U.S.C.A., Sec. 59a(a) (in 1945 Cumulative Annual Pocket Part) provides:

"(a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, *under the United States Government* or the municipal government of the District of Columbia *or under any corporation, the majority of the stock of which is owned by the United States,* shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in any of the services mentioned in Title 37, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. As used in this section, the term 'retired pay' shall be construed to include

credits for all service that lawfully may enter into the computation thereof."

5 U.S.C.A., Sec. 134d (in 1945 Cumulative Annual Pocket Part) provides:

"*Every officer and employee of the United States* and *every person acting on behalf of a wholly owned corporation* who makes a shipment of valuables in good faith pursuant to and substantially in accordance with the regulations prescribed under section 134 of this title shall be deemed, insofar as there may be concerned the propriety with respect to such shipment of any act or omission governed by such regulations, to be acting in faithful execution of his duties of office and in full performance of the conditions of his bond and oath of office, if any."

28 U.S.C.A., Sec. 870 (in 1945 Cumulative Annual Pocket Part) provides:

"Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, *either by the United States* or by direction of any department of the Government *or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly,* no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

Section 7 of the Act of June 19, 1934, 48 Stat. 1109 amended Section 870 by including therein after "Government" the following: "or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly."